Office-Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2085

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAVID GARY CHAMPEAU
Petitioner,
v.
THE STATE OF OKLAHOMA
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE*
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL DIVISIONS

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921
ATTORNEYS FOR RESPONDENT

*Counsel of Record

BEST AVAILABLE COPY

24 pp

No. 83-2085

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAVID GARY CHAMPEAU
Petitioner,
v.
THE STATE OF OKLAHOMA
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE*
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL DIVISIONS

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921
ATTORNEYS FOR RESPONDENT

*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. May an appellant, in instances where he has specifically failed to show standing to bring a Fourth Amendment challenge, still raise the issue of the constitutionality of the search.

2. Does an appellate court, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, have the power to raise the issue of standing on its own motion.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Opinion Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Reasons Why the Writ Should Be Denied	9
Proposition I	
THE PETITIONER HAS THE BURDEN TO SHOW STANDING WHEN THE CONSTITUTIONALITY OF A SEARCH IS AT ISSUE; FURTHERMORE, THIS PREVENTS THE PETITIONER FROM ASSERTING ANY EXPECTATION OF PRIVACY ISSUE SINCE HE HAS FAILED TO SHOW ANY PERSONAL INTEREST BEING VIOLATED.	9

TABLE OF CONTENTS

Page

Proposition II

THE DECISION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS IS CONSISTENT WITH EXISTING FOURTH AND FOURTEENTH AMENDMENT LAWS; FURTHERMORE, THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI SINCE THE CASE WAS PROPERLY INTERPRETED IN ACCORDANCE WITH APPROPRIATE CASE LAW IN THAT THE PETITIONER FAILED TO SHOW STANDING TO RAISE THE SEARCH CONSTITUTIONALITY ISSUE. 13

Conclusion 17

TABLE OF AUTHORITIES

Page

CASES

Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) 11

Champeau v. State, 678 P.2d 1192 (Okl.Cr. 1984) 11

Edwards v. State, 651 P.2d 1335 (Okl.Cr. 1982) 14

Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) 16

Finch v. State, 644 P.2d 1378 (Okl.Cr. 1982) 14

Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) 10,11

Meeks v. State, 637 P.2d 1259 (Okl.Cr. 1981) 14

Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) 10,14,16

Rawlings v Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) 10,12,13

TABLE OF AUTHORITIES

	Page
Snyder v. Massachusettes, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934)	15
Underwood v. State, 659 P.2d 948 (Okl.Cr. 1983)	14
Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983)	16

STATUTES

63 O.S.1981, § 2-204	3
63 O.S.1981, § 2-401	3
63 O.S.1981, § 2-509	3
63 O.S.1981, § 2-509(1)	4

CONSTITUTION

U.S. Const., Fourth Amendment	13,14,16
U.S. Const., Fourteenth Amendment	2,3,13

OTHER AUTHORITIES

28 U.S.C. § 1257(3)	2

No. 83-2085

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAVID GARY CHAMPEAU
Petitioner,

v.

THE STATE OF OKLAHOMA
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State

of Oklahoma entered on February 15, 1984, and to which rehearing was denied on April 17, 1984.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 678 P.2d 1192 (Okl.Cr. 1984).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment, section 1, to the United States Constitution provides, in part, as follows:

> ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

Title 63 O.S.1981, § 2-204 provides, in part, as follows:

> "A. Except as authorized by the Uniform Controlled Dangerous Substances Act, it shall be unlawful for a person: 1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense, a controlled dangerous substance."

Title 63 O.S.1981, § 2-509 provides, in part, as follows:

> "All species of plants from which controlled dangerous substances in Schedules I and II may be derived are hereby declared inimical to health and welfare of the public, and the intent of the Legislature is to control and eradicate these species of the plants in the State of Oklahoma.

> 1. It shall be unlawful for any person to cultivate or produce, or to knowingly permit the cultivation, production, or wild growing of any species of such plants, on any lands owned or controlled by such person, and it is hereby declared the duty of every such person to destroy all such plants found growing on lands owned or controlled by him."

STATEMENT OF THE CASE

Gary David Champeau, [hereinafter referred to as the "Petitioner"], was convicted of the crimes of Unlawful Cultivation of Marijuana in violation of 63 O.S.1981, § 2-509(1) and Unlawful Possession of Marijuana With Intent To Distribute in violation of 63 O.S.1981, § 2-401, in the District Court of Pottawatomie County, State of Oklahoma. The Petitioner was represented by counsel. The jury returned a verdict finding the Petitioner guilty of both counts and sentenced him to ten years in the custody of the Department of Corrections

and a fine of $25,000.00 on the first count, and ten years in the custody of the Department of Corrections and a fine of $5,000.00 on the second count. The trial court sentenced the defendant in accordance with the jury's verdict.

The facts which were presented to the Court reveal that in the course of a marijuana cultivation investigation arising from a tip given by a confidential informant to officers of the Midwest City Police Department, Detective Bill Howard of the Midwest City Police Department and Agent John Guyton of the Oklahoma Bureau of Narcotics and Dangerous Drugs set up surveillance of a residence in Norman, Oklahoma in the early morning hours of October 23, 1980 (Tr. 30; P.H. Tr. 8). These officers observed one of the co-defendants in this case, Terry Hightower, leave this resi-

dence at around 8:00 a.m. (P.H. Tr. 9). The officers then proceeded to maintain a roving surveillance of this co-defendant, following him from the residence in Norman to a rural area in Pottawatomie County, Oklahoma, located on Bethel Road, arriving there at approximately 10:00 a.m. (Tr. 31,33; P.H. tr. 9,10). The officers maintained a surveillance of this site by driving past several times on Bethel Road. A second co-defendant, Robert Hightower, was observed to arrive at this site at approximately 10:30 a.m. (Tr. 34). Shortly after this, agents from the Oklahoma Bureau of Narcotics and Dangerous Drugs (OBNDD) called for a fly-over of this site by other agents trained in detecting marijuana from the air (P.H. Tr. 10,98,99). Upon verification from the agents conducting the fly-over, Agent Guyton and

the other officers proceeded to the Pottawatomie County Court House to obtain a search warrant for the site on Bethel Road (Tr. 35; P.H. Tr. 100). Agent Guyton and Detective Howard prepared the affidavit to obtain the search warrant (P.H. Tr. 23,24,31), and Agent Guyton signed it (O.R. 99,100). A warrant was then issued pursuant to this affidavit.

The search warrant for the residence and premises on Bethel Road was executed between 5:30 p.m. and 6:00 p.m. on this same date of October 23, 1980 (Tr. 35). Agent Guyton, Detective Howard and Trooper Gary Thomas of the Oklahoma Highway Patrol out of Pottawatomie County were in the lead car which approached this site in the process of serving the warrant (Tr. 210; P.H. Tr. 13). Agent Guyton cut the padlock on

the gate blocking the driveway to the site and the group of officers proceeded down the driveway to the mobile home located on the premises (Tr. 36,37). Trooper Thomas announced the purpose of their visit over his unit's public address system and instructed anyone inside to come out and surrender (Tr. 37). The Petitioner was observed at this time to exit the trailer house on the site (Tr. 179). Upon entering the mobile home, the officers found marijuana, marijuana drying racks, and mail addressed to the Petitioner inside the mobile home (Tr. 38,39). Also, lying in plain view, were a group of pictures showing the Petitioner and the two co-defendants frolicking in a large patch of marijuana (Tr. 94-96). Upon further investigation, a large semi-trailer was discovered near the mobile home which con-

tained marijuana and more processing apparatus (Tr. 41,42). Two separate fields of growing marijuana were subsequently discovered approximately one hundred yards west of the mobile home (Tr. 45). In the fields was an irrigation system of PVC pipes and sprinklers connected to a pump house located near the trailer house (Tr. 47). Approximately four tons of marijuana was subsequently seized from the site (Tr. 98).

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION I

THE PETITIONER HAS THE BURDEN TO SHOW STANDING WHEN THE CONSTITUTIONALITY OF A SEARCH IS AT ISSUE; FURTHERMORE, THIS PREVENTS THE PETITIONER FROM ASSERTING ANY EXPECTATION OF PRIVACY ISSUE SINCE HE HAS FAILED TO SHOW ANY PERSONAL INTEREST BEING VIOLATED.

The State contends that the Oklahoma Court of Criminal Appeals properly addressed Petitioner's challege to the

constitutionality of the search. Governmental officials must violate a defendant's legitimate expectation of privacy in order to find an illegal search. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). However, a criminal defendant has at all times the "burden of proving not only that the search . . . was illegal, but also that he had a legitimate expectation of privacy. . . ." Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980).

Furthermore, in Rakas v. Illinois, supra, the Supreme Court rejected the "automatic standing" argument of Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). "Fourth Amendment rights are personal rights which, like some other constitutional

rights, may not be vicariously asserted." 439 U.S. at 133, citing Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 966, 22 L.Ed.2d 176 (1969). A criminal defendant would not not be able to contest the legality of a search by merely being "targeted" by a search. 439 U.S. at 134.

In their opinion below, the Oklahoma Court of Criminal Appeals noted that at the preliminary hearing, neither the Petitioner nor the co-defendants testified as to the ownership of the land or structures. Further, the record was void as to what right or under what circumstances the Petitioner was present on the land searched. Champeau v. State, 678 P.2d 1192, 1195-1197 (Okl.Cr. 1984).

The State would assert that the Petitioner's claim of an illegal search

fails completely due to his inability to show any expectation of privacy. While it may have shown that he had an ownership of the drugs, the State would argue that this alone is not sufficient to show standing. In Rawlings v. Kentucky, supra, the Supreme Court clearly rejected the "notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." 448 U.S. at 105. The Defendant clearly has failed to show any expectation of privacy in the instant case, and therefore, fails to demonstrate standing to challenge the search.

PROPOSITION II

THE DECISION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS IS CONSISTENT WITH EXISTING FOURTH AND FOURTEENTH AMENDMENT LAWS; FURTHERMORE, THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI SINCE THE CASE WAS PROPERLY INTERPRETED IN ACCORDANCE WITH APPROPRIATE CASE LAW IN THAT THE PETITIONER FAILED TO SHOW STANDING TO RAISE THE SEARCH CONSTITUTIONALITY ISSUE.

The State contends that the issue of the constitutionality of the search was properly disposed of by the Oklahoma Court of Criminal Appeals in that the Petitioner failed to show standing in order to raise the search issue. It is clear that the burden rests on the Petitioner to show a legitimate expectation of privacy. Rawlings v. Kentucky, supra.

This doctrine has been interpreted in a great amount of decisions by the Oklahoma Court of Criminal Appeals. It remains clear that the Court requires the criminal defendant to show a legit-

inmate expectation of privacy in the area searched. Underwood v. State, 659 P.2d 948 (Okl.Cr. 1983); Edwards v. State, 651 P.2d 1335 (Okl.Cr. 1982); Finch v. State, 644 P.2d 1378 (Okl.Cr. 1982).

It is also well-settled in Oklahoma that a criminal defendant's standing to bring a Fourth Amendment challenge must first be determined before inquiry can be made concerning violation of Fourth Amendment rights. Underwood, supra; Meeks v. State, 637 P.2d 1259 (Okl.Cr. 1981).

The State would argue that the decisions of the Oklahoma Court of Criminal Appeals regarding the constitutionality of searches are clear as to the standing requirement. Furthermore, these decisions are based on Rakas v. Illinois, supra, and are expressly de-

tailed in the Court's opinion in the instant case. 678 P.2d at 1195-1196.

The Court raised the issue of Petitioner's lack of standing sua sponte, and the State would assert that it is clearly in the interest of justice for the appellant court to raise on its own motion, issues which heretofore are not addressed. This line of argument is the primary foundation for the doctrine of "fundamental error."

A state is free to regulate the procedure of its own courts in accordance with its own conception of policy and fairness. Snyder v. Massachusettes, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed.2d 674 (1934). The State would assert that the Oklahoma Court of Criminal Appeals looked at the entire record and concluded on its own motion that the Petitioner failed to show standing,

which is a necessary aspect under the Oklahoma procedure. Furthermore, this determination is an issue of state law and should not be disturbed since this does not concern an issue of constitutional dimension. Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 382, 78 L.Ed.2d 187 (1983); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Therefore, since the requirement for the criminal defendant to show standing in Fourth Amendment questions remains a state issue, and since this determination is founded on Rakas, the State would suggest that the decision should not be disturbed. Additionally, even though the Court below raised the issue sua sponte, the opinion is not faulty since it is within the Court's

domain to raise such issues for the purpose of furthering justice.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL DIVISIONS
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT